No. 95-300

Supreme Court, U.S.
FILED
AUG 21 1995

IN THE

Supreme Court of the United States

October Term, 1995

PETER SKYWARK,

Petitioner,

against

UNITED STATES LINES, INC., and UNITED STATES LINES (S.A.) INC. REORGANIZATION TRUST,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BERNARD A. HELFAT
Attorney for Petitioner
100 Maiden Lane
New York, NY 10038
(212) 504-6080, 6060

Of Counsel:
FRED R. PROFETA, JR.
MICHAEL J. ORLOFSKY

THE REPORTER CO., INC.- Walton, NY 13856 - 800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202 - 315-426-1235
NYC Office - 30 Vesey St., New York, NY 10007 - 212-732-6978 - 800-800-4264
(7503 – 1995)
Reproduced on Recycled Paper

QUESTIONS PRESENTED FOR REVIEW

1. Is there a conflict between various United States Courts of Appeal, which conflict also includes the Illinois state court of last resort, on the issue of a statute of limitations suspension under the Bankruptcy Code during an automatic stay of litigation (11 U.S.C. §108(c))?

2. Inasmuch as the statute of limitations in question pertains to the Jones Act (46 U.S.C. §688, *et seq.*), do the requirements of uniformity in the construction of both that statute and the Bankruptcy Code provide special and important reasons for this Court to resolve the conflict between the jurisdictions?

3. Did the United States Court of Appeals for the Second Circuit err below in not granting a suspension of the Jones Act three year statute of limitations during the pendency of an automatic bankruptcy stay, which stay prohibited the enforcement of the plaintiff-petitioner's Jones Act claim?

4. Did the Court of Appeals especially err in not holding that 11 U.S.C. §108(c)(1) recognizes suspensions that arise from decisional law as well as statutory law?

5. Did the Court of Appeals especially err because the decisional law in question is a part of the General Maritime Law, which Law is particularly solicitous of the rights of injured seamen?

6. Did the Court of Appeals especially err because the plaintiff-petitioner herein provided prompt notice of his claim in all of its particulars to the defendants-respondents within 9 months of his injury, thereby eliminating any possible claim of prejudice by defendants-respondents?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
A. The Writ Should be Granted Because of Conflicting Decisions by Various United States Courts of Appeal and State Courts of Last Resort.	7
B. The Decisions below and in *Aslanidis* are in Conflict with this Court's Decisions Regarding Rules of Statutory Construction.	11
C. The Common Law has Long Provided for Suspensions of Limitation Periods Where Circumstances Block Persons From Enforcing Their Rights.	15
D. If a Suspension is Available Under Common Law, *A Fortiori* it is Available under Maritime Law Which is Especially Solicitous of Seamen's Rights.	18
CONCLUSION	23
APPENDIX	
Opinion and Order of the United States Court of Appeals for the Second Circuit	1a

Judgment of the United States District Court for the Southern District of New York Granting Defendants' Motion for Summary Judgment 5a

Opinion of the United States District Court for the Southern District of New York 6a

TABLE OF AUTHORITIES

Page(s)

Cases:

Aguilar v. Standard Oil Co., 318 U.S. 724 (1943) 18

American Export Lines. Inc. v. Alvez, 446 U.S. 274 (1980) 18

American Pipe & Construction Co. v. Utah, 414 U.S. 539 (1974) 16,22

Archer v. Edwards, 65 P.2d 115 (Dis.Ct. App. California 1937) 16

Aslanidis v U.S. Lines, Inc., 7 F.3d 1067 (2d Cir. 1993) 6,8, 10,11, 12,21

Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), *cert denied* 386 U.S. 1021 (1967) 17

Braun v. Saurwein, 77 U.S. 218 (1869) 15

Brown Estate, 152 Pa.Sup.Ct. 252 (1943) 17

Burnett v. New York Central Railroad Co., 380 U.S. 424 (1965) 18,20, 21

Calhoon v. Harvey, 379 U.S. 134 (1964) 11

Chelentis v. Luckenbach S.S. Co., 247 U.S. 273 (1918). 11

Connecticut Nat. Bank v. Germain, 503 U.S. 249 (1992) 13

Cortes v. Baltimore Insular Line, 287 U.S. 358 (1932) 18

Cosmopolitan Co. v. McAllister, 337 U.S. 783 (1949) 18

Creswell v. Doe and MVAIC, 22 A.D.2d 942, 255 N.Y.S.2d 946 (App.Div. 2d Dept. 1964). 17,21

Engel v. Davenport, 271 U.S. 33 (1926) 7,12

Garbe Iron Works, Inc. v. Priester, 99 Ill.2d 84, 457 N.E.2d 422 (Sup.Ct. Ill. 1983) 8,9, 11,12, 17

Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964) 11

Glus v. Brooklyn Eastern Terminal, 359 U.S. 231 (1959) 16

Green v. Bock Laundry Machines Co., 490 U.S. 504 (1988) 13

Hanger v. Abbott, 6 Wall. 532 (1867) 16

Hill v. Grand Lodge of I.O.O.F., 157 Kan. 34, 138 P.2d 38 (Sup.Ct. Kansas 1943) 17

Hipkins v. United States, 1 F.Supp. 505 (D.Md. 1932) 7

Hourly Messengers v. Ins. Co. of North American, 163 N.J.Super. 276, 394 A.2d 880 (App.Div. 1978) 21

In re Chemisphere Partners, 90 B.R. 380 (Bankr. N.D. Ill. 1988) 10

In re Crysen/Montenay Energy Co., 166 B.R. 546 (S.D.N.Y. 1994). 11

In re Coan, 96 B.R. 828 (Bankr. N.D. Ill. 1989) 10

In re Design Builders, 18 B.R. 392 (Bankr. D. Idaho 1981) 10

In re Houts, 23 B.R. 705 (Bankr. W.D.Mo. 1982) 10

In re Hunters Run Ltd. Partnership, 875 F.2d 1425 (9th Cir. 1989) 9,17, 21

In re Liberatore, 574 F.2d 78 (2d Cir. 1978) 17

In re Morton, 866 F.2d 561 (2d Cir. 1989) 8

In re New England Carpet Co., 26 B.R. 934 (Bankr.Vt. 1983) 10

In re Richards, 994 F.2d 763 (10th Cir. 1993)..... 10

In re Victoria Grain Co., 45 B.R. 2 (Bankr.Minn. 1984)..... 10

Jackson v Johnson, 950 F.2d 263 (5th Cir. 1992)..... 16

Jamison v. Encarnacion, 281 U.S. 635 (1930) 18

Kansas State Board of Healing Arts v. Seaholtz, 210 Kan. 694, 504 P.2d 576 (Sup.Ct. Kansas 1972).... 7

Kernan v. American Dredging Co., 355 U.S. 426 (1958) ... 19

Major Lumber v. G&B Remodeling, 817 S.W.2d 474 (Mo.Ct.App. 1991) 9

Mamer v. Apex R.E.&T, 852 F.Supp. 870 (E.D.Mo. 1994), *aff'd* 59 F.3d 780 (8th Cir. 1995)..... 10

McGee v. Kirby, 118 P.2d 199 (Sup. Ct. Oklahoma 1941) .16,22

McKinney v. Waterman Steamship Corp., 739 F.Supp. 678 (D.Mass. 1990), *aff'd* 925 F.2d 1 (1st Cir. 1991) 9,10, 17

Moragne v. States Marine Lines, 398 U.S. 375 (1970)..... 18

Mt. Hood Stages v. Greyhound Corp., 616 F.2d 395 (9th Cir. 1980), *cert. denied* 449 U.S. 831 (1980) 17,21

O'Hara v. State of New York, 112 N.Y. 146 (1889) 16

Osbourne v. United States, 164 F.2d 767 (2d Cir. 1947).... 19

Patterson v. Shumate, 504 U.S. 753 (1992)..... 14

Pizel v. Zuspann, 795 P.2d 42 (Sup.Ct. Kansas 1990).....16,21

Ragland v. Alpha Aviation, Inc., 285 Ark. 182, 686 S.W.2d 391 (Sup. Ct. Ark. 1985)..... 16

Railway Labor Executives' Assn. v. Gibbons, 455 U.S. 457 (1982)..... 11

Rogers v. Corrosion Products, Inc., 42 F.3d 292 (5th Cir. 1995), *cert. denied* 115 S.Ct. 2614 (1995) 8,9, 10

Shaw v. Railroad Company, 101 U.S. 557 (1879) 17

Socony-Vacuum Co. v. Smith, 305 U.S. 424 (1938)..... 18

The Arizona v. Anelich, 298 U.S. 110 (1935) 18

The Sea Gull, 21 F.Cas. 909 (No.12,578) (CC MD 1965) .. 18

Timoni v. United States, 419 F.2d 294 (D.C. Cir. 1969)..... 17

United States v. Markowitz, 34 F.Supp. 827 (N.D. Cal. 1940) 7

United States v. Mead, 426 F.2d 118 (9th Cir. 1970)..... 17

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989)..... 14

United States v. Texas, 113 S.Ct. 1631 (1993)..... 17

United States v. Webb, Inc., 397 U.S. 179 (1969)..... 19

United States v Wiley, 11 Wall. 508 (1870)..... 8

Walker v Hanes, 570 S.W.2d 534, 540 (Ct. Civ. App. Texas 1978)..... 16

Wells v California Tomato Juice, Inc., 118 P.2d 916 (Cal.Ct. App. 1941) 10

West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991)..... 13

Statutes:

11 U.S.C. §108 .....2,6, 7,11, 12,14, 15,17

11 U.S.C. §362 2,3

11 U.S.C. §541(c)(2) 15
28 U.S.C. §1254(1) 2
29 U.S.C. §1056(d) (1) 15
42 U.S.C. §1983 16
45 U.S.C. §51 19
45 U.S.C. §56 ..... 3,5, 7,12
46 U.S.C. §688 ..... 2,3, 4,7, 11,19
46 U.S.C. §763a 3,4, 7,12

Other Authorities:

Ballentine's Law Dictionary (3d Ed. 1969) 8
Kelch, *An Apology for Plain Meaning Interpretation of the Bankruptcy Code*, 10 Bankr. Dev. J. 289 (1994) 14
54 C.J.S. *Limitations of Actions* §121 16
51 Am.Jur.2d *Limitation of Actions* §170 16
Gilmore and Black, *The Law of Admiralty* (2d Ed. 1975) .. 19

IN THE

Supreme Court of the United States

October Term, 1995

No._____

PETER SKYWARK,
Petitioner,

v.

UNITED STATES LINES, INC., and
UNITED STATES LINES (S.A.) INC
REORGANIZATION TRUST,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The May 22, 1995 opinion and order of the United States Court of Appeals for the Second Circuit, which affirmed the judgment of the United States District Court, is not reported by order of the Court of Appeals. It is reprinted in the Appendix hereto, at pp.1a-4a. The opinion and order of the United States District Court for the Southern District of New York, dated September 8, 1994, which granted respondents' motion for summary judgment, is not reported. It is reprinted in the Appendix at pp.6a-8a.

JURISDICTION

The order and opinion of the United States Court of Appeals, affirming the grant of respondents' motion for summary judgment, was entered on May 22, 1995. This action was brought pursuant to 46 U.S.C. §688, commonly known as the Jones Act. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

11 U.S.C. §108(c)

Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of -

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C. §362(a)(1)

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the

commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

46 U.S.C. §688(a)

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right to remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

45 U.S.C. §56

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

46 U.S.C. §763a

Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

STATEMENT OF THE CASE

On August 14, 1986, plaintiff-petitioner Peter Skywark, then a seaman employed aboard the MV AMERICA GEORGIA, a vessel owned by defendant-respondent United States Lines, Inc., suffered serious and permanent head injuries when struck by a heavy steel ring (40)[1]. Some three months later, on November 24, 1986, U.S. Lines filed for bankruptcy in the Southern District of New York (8). As a result of this petition, and pursuant to 11 U.S.C. §362(a) of the Bankruptcy Code, the Bankruptcy Court imposed a stay preventing all "pre-petition" creditors from commencing any cause of action against defendant United States Lines (13-20). To preserve his right to later bring suit on account of his personal injuries, on May 14, 1987 Mr. Skywark filed a proof of claim in the Bankruptcy Court (30).

During the pendency of the stay, a Plan of Reorganization for the Debtor was confirmed by the Bankruptcy Court (17-20). Under the Plan, the Trustee was directed to secure for the benefit of the holders of personal injury claims all insurance rights and indemnification and contribution rights (63-64). Before entering bankruptcy, United States Lines had insured each of its vessels through certain marine protection and indemnity associations, or "clubs". Specifically, the Plan authorized the Trustee to enter into agreements with each of these clubs to assure that sufficient funds would be available to compensate claimants such as plaintiff (63). The Plan even empowered the Trustee to bring suit against any club that failed to cooperate with him (64).

After confirmation of the Plan, plaintiff entered into settlement negotiations with the Trustee (47). All facts relating to liability

---

[1] Numbers in parentheses with nothing more refer to pages in the Joint Appendix filed with the United States Court of Appeals for the Second Circuit. Numbers followed by "a" refer to pages in the Appendix reprinted in this Petition.

and damages were brought to the attention of the Trustee. By letter dated August 9, 1990, John T. Paulyson, Co-Trustee, offered to settle plaintiff's claim for $20,000 in stock of the reorganized United States Lines (72-73). In that letter, Mr. Paulyson acknowledged having made "a thorough review of all pertinent factors relating to this claim." (72). A similar offer was extended to plaintiff by Co-Trustee Vincent W. Hatala, Jr. on January 31, 1992, at which time Mr. Hatala advised he would move to lift the stay if the offer was not accepted by February 16, 1992 (78). At no time during the settlement negotiations did any Trustee ever indicate that he believed the statute of limitations period had expired earlier or that any extension would expire within 30 days after he moved to lift the stay. Moreover, with good reason, plaintiff's counsel understood existing law to toll the applicable statute of limitations for the time the bankruptcy stay prevented plaintiff from filing his complaint (48).

On August 6, 1992, on the motion of the Trustee, the Bankruptcy Court lifted the stay preventing creditors from bringing suit. On August 12, 1992, the Trustee served plaintiff with notice of the Court's order lifting the stay (33). *Less than three months later*, on November 12, 1992, plaintiff served and filed a complaint stating a claim of negligence under the Jones Act and a claim of unseaworthiness under the General Maritime Law (12, 39-41).

The Jones Act, 46 U.S.C. §688, incorporates by reference the three-year statute of limitations from the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §56. Plaintiff's claim of unseaworthiness under the General Maritime Law is governed by the three-year Uniform Statute of Limitations for Maritime Torts, 46 U.S.C. §763a. The Uniform Statute, as its title suggests, was enacted to provide a uniform limitations period of all maritime torts. Therefore, in the case at bar, each of the applicable limitations periods is three years from the date that the claim accrued.

Excluding the period during which the stay was in effect and plaintiff was enjoined from bringing suit, less than *seven months*

had elapsed from the time of his injury before plaintiff filed his complaint. However, defendants moved for summary judgment on the grounds that plaintiff's action was time barred because not brought within 30 days of the expiration of the stay (see 11 U.S.C. §108 (c) (2)). Plaintiff argued that the statute of limitations had been tolled during the pendency of the stay, invoking the language of §108(c)(1). The District Court agreed with defendants and dismissed plaintiff's complaint on the authority of *Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067 (2d Cir. 1993) (6a-8a). The judgment of the District Court was affirmed by the Second Circuit Court of Appeals, also on the authority of *Aslanidis* (1a-4a).

REASONS FOR GRANTING THE WRIT

A. The Writ Should be Granted Because of Conflicting Decisions by Various United States Courts of Appeal and State Courts of Last Resort.

In pertinent part, 11 U.S.C. §108 (c) reads as follows:

> "*[I]f applicable nonbankruptcy law* . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of -
>
> (1) the end of such period, *including any suspension of such period* occurring on or after the commencement of the case; or-
>
> (2) 30 days after notice of termination or expiration of the stay under section 362 . . . " (emphasis added).

The "applicable non-bankruptcy law" is the Jones Act, 46 U.S.C. §688, and the warranty of seaworthiness under the General Maritime Law. The former incorporates by reference the three year statute of limitations under the Federal Employers' Liability Act (the FELA), 45 U.S.C. §56, *Engel v. Davenport*, 271 U.S. 33 (1926); the latter is governed by the three year Uniform Statute of Limitations for Maritime Torts, 46 U.S.C. §763a.

It is well established that:

> "The *suspension* of a statute of limitations for a certain period of time, is, in effect, 'time taken out' for that period and adds the same period of time to the limitation provided in the statute." *Hipkins v. United States*, 1 F.Supp. 505, 506 (D.Md. 1932).

To the same effect is *Kansas State Board of Healing Arts v. Seaholtz*. 210 Kan. 694, 504 P.2d 576, 578 (Sup.Ct. Kansas 1972), and *United States v. Markowitz*, 34 F.Supp. 827, 830

(N.D. Cal. 1940). *See also United States v Wiley*, 11 Wall. 508, 515 (1870) and *Ballentine's Law Dictionary* (3d Ed. 1969), pp.1247-48.

In its decision below, the Court of Appeals held that plaintiff was not entitled to a "suspension" or a toll of the three year statute of limitations during the pendency of the bankruptcy stay (1a-4a). In so doing, the Court relied upon its decision in *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067 (2d Cir. 1993), which rejected a toll in favor of an injured seaman "on almost identical facts . . . ." (3a). Central to the *Aslanidis* decision was the observation that "by its terms §108(c) does not provide for tolling of any externally imposed time bars, such as those found in the two maritime statute of limitations." *Id.* at 1073. The Court went on to conclude that such external tolls must be found in "*other* federal or state statutes." *Id.* at 1073.

Our research indicates that *Aslanidis* was the first appellate decision holding that a toll does not arise during the pendency of a bankruptcy stay. Indeed, we submit that the *Aslanidis* court was constrained to engage in tortuous reasoning in order to avoid its own holding in *In re Morton*, 866 F.2d 561 (2d Cir. 1989). The Second Circuit also broke with many courts in other jurisdictions, ultimately creating a significant split recently described in *Rogers v. Corrosion Products, Inc.*, 42 F.3d 292, 296 (5th Cir. 1995), *cert. denied* 115 S.Ct. 2614 (1995):

> "We are not the first circuit to face this issue. Panels of both the Second and Ninth Circuits have examined the language and legislative history of this section of the Code. Unfortunately, they have created a potential split in result. Other federal courts have divided likewise."

The leading case holding contrary to *Aslanidis* is *Garbe Iron Works, Inc. v. Priester*, 99 Ill.2d 84, 457 N.E.2d 422

(1983), wherein the Supreme Court of Illinois reasoned as follows:

> "*Defendants argue that section 108(c)(1) should have no application here since it is only triggered when a particular statutory scheme provides for the suspension of a limitation period,* and our statutes do not provide for suspension in these circumstances. The sole basis for their argument is a legislative statement that section 108(c)(1) includes any special suspensions of limitation periods (11 U.S.C.A. sec. 108, Legislative Statements, at 101 (1979).) Nowhere however, do the legislative statements or the committee notes indicate that the application of section 108(c)(1) is limited to such situations, and to so hold would require a strained construction of that section and defeat its apparent purpose. *The fact that the legislative statement indicates that 108(c)(1) 'includes' special statutory provisions suspending limitations otherwise applicable implies a broader purpose than that attributed to it by defendants.* While not entirely free from doubt, the intent of sections 108(c)(1) and (2) seems to be to extend the period within which a creditor may act by the greater of (1) the period granted by a particular statutory scheme, (2) *the period during which action has been stayed by the Bankruptcy Act*, or (3) 30 days after notice of the termination of the stay." 457 N.E.2d at 424-25 (emphasis added).

To the same effect is *Major Lumber v. G&B Remodeling*, 817 S.W.2d 474, 477 (Mo.Ct.App. 1991), which specifically relied upon *Garbe*. As noted in *Rogers, supra* at 296-297, the Ninth Circuit also lined up with *Garbe* in the case of *In re Hunters Run, Ltd. Partnership*, 875 F.2d 1425, 1428-29 (9th Cir. 1989) ("our view of section 108(c)'s tolling effect is wholly consistent with that enunciated by courts in other states.").

At the time the stay herein was lifted (31-32), the First Circuit Court of Appeals was the only court to have spoken on this issue in the context of a Jones Act proceeding. In *McKinney v. Waterman Steamship Corp.*, 739 F.Supp. 678 (D.Mass. 1990), *aff'd* 925 F.2d 1 (1st Cir. 1991), the District Court had noted:

> "Here, however, the running of the statute of limitations was suspended on December 1, 1983, when Waterman [Steamship Corporation] filed for reorganization. See 11 U.S.C. §362 (automatically staying commencement of actions against bankruptcy debtors).
>
> "Thus, nearly two years had passed before the clock was suspended - leaving twelve and a half months in which McKinney might commence his action after the clock began running again." 739 F.Supp. at 682.

Ultimately, the plaintiff in *McKinney* failed to timely file his claim, even after the tolling period had been considered. Nonetheless, on appeal, the First Circuit recognized as appropriate the tolling of the statute of limitations for the entire period of the bankruptcy stay:

> "McKinney's difficulty is that, *after subtracting the full period that the automatic stay was in effect*, his present suit was still not brought within three years." 925 F.2d at 3 (emphasis added).

The following courts have either held, or indicated, that the applicable statute of limitations is tolled during the pendency of a bankruptcy stay: *In re Richards*, 994 F.2d 763, 765 (10th Cir. 1993); *In re Chemisphere Partners*, 90 B.R. 380, 382 (Bankr. N.D. Ill. 1988), *In re Coan*, 96 B.R. 828, 832 (Bankr. N.D. Ill. 1989); *In re Design Builders*, 18 B.R. 392, 394-95 (Bankr. D. Idaho 1981); *In re Houts*, 23 B.R. 705, 707 (Bankr. W.D.Mo. 1982); *In re New England Carpet Co.*, 26 B.R. 934, 939 (Bankr.Vt. 1983); *In re Victoria Grain Co.*, 45 B.R. 2, 6 (Bankr.Minn. 1984); *Wells v. California Tomato Juice, Inc.*, 118 P.2d 916, 918-19 (Cal.Ct. App. 1941).

Our research indicates that the Fifth Circuit Court of Appeals (in *Rogers*) is the only appellate jurisdiction to have aligned itself with the Second Circuit result in *Aslanidis* (and now with the decision below). However, District Courts have held in accordance with *Aslanidis* in *Mamer v. Apex R.E.&T*, 852 F.Supp. 870, 872 (E.D.Mo. 1994), *aff'd* 59 F.3d 780 (8th Cir. 1995) (not

yet reported) (a seaman's case)[2] and *In re Crysen/Montenay Energy Co.*, 166 B.R. 546, 555 (S.D.N.Y. 1994).

We submit that this plain split respecting the proper interpretation of 11 U.S.C. §108 (c) meets the criteria set forth in this Court's Rule 10 for the grant of a petition for a writ of certiorari. *Calhoon v. Harvey*, 379 U.S. 134, 137 (1964). The central issue in this case is one upon which the various Courts of Appeal are in conflict. There is also a conflict between the Second and Fifth Circuits and the "state court of last resort" in Illinois (*Garbe*).

The issue at bar is fundamental to the Bankruptcy Code and the Jones Act, two federal statutes which must be administered uniformly throughout the nation. This Court has often noted the criticality of uniform interpretations regarding both the Jones Act and the General Maritime Law. *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 155 (1964), *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 273, 281-82 (1918). It would now appear that a Jones Act seaman in California, Massachusetts, or Illinois, whose claim is subject to a bankruptcy stay, will be treated differently from an identical seaman in either New York or Louisiana. We submit that this Honorable Court should not tolerate such a disparity. Uniformity of results is no less critical with respect to the Bankruptcy Code. *Railway Labor Executives' Assn. v. Gibbons*, 455 U.S. 457, 465 (1982).

B. The Decisions below and in *Aslanidis* are in Conflict with this Court's Decisions Regarding Rules of Statutory Construction.

On the facts of this case, the "applicable non-bankruptcy law" referred to in 11 U.S.C. §108 (c) is the Jones Act, 46 U.S.C. §688, and the warranty of seaworthiness under the General Maritime

---

[2] On appeal, because of the facts peculiar to his case, plaintiff did not argue that he was entitled to a suspension under §108(c), and the Eighth Circuit therefore did not discuss the issues here being considered. (Westlaw document, p.3).

Law. The former incorporates by reference the three year statute of limitations under the FELA, 45 U.S.C. §56, *Engel v. Davenport*, 271 U.S. 33 (1926); the latter is governed by the three year Uniform Statute of Limitations for Maritime Torts, 46 U.S.C. §763a.

The *Aslanidis* court conceded that these maritime limitation periods *could* be tolled by law external to the Bankruptcy Code, but concluded that such a toll could only derive from a *statutory* source, to wit:

> "The reference in §108(c) (1) to 'suspension' of time limits clearly does not operate in itself to stop the running of a statute of limitations: rather, this language merely incorporates *suspensions of deadlines that are expressly provided in other federal or state statutes*." 7 F.3d at 1073 (emphasis added).

Finding no such statutory toll relating to maritime claims, the Second Circuit held that the Jones Act seaman was time barred. However, while invoking the rule of "plain meaning" (7 F.3d at 1072-3) to support its construction of §108(c), in fact the Second Circuit ignored what we suggest is the unambiguous and general scope of the word "suspension", going straight to purported "legislative history" in order to justify a narrow interpretation limited to statutory sources. As the Court reasoned in *Aslanidis*:

> "Any ambiguity with respect to this 'suspension' reference in §108(c) (1) is cleared up by examining the provision's legislative history. This history makes evident that §108(c)(1) refers to only 'special suspensions' that are found in non-bankruptcy provisions such as the Internal Revenue Code. 124 Conf.Rec. H11,109 (daily ed. Sept, 28, 1978): accord 2 Lawrence P. King, *Collier on Bankruptcy* ¶108.04 (15th ed. 1993); *see also* H.R.Rep. No. 595, 95th Cong. 1st Sess.318, *reprinted in* 1978 U.S.C.C.A.N. 5787, 6275." 7 F.3d at 1073.

Significantly, the Supreme Court of Illinois in *Garbe* read the same legislative history and arrived at a contrary construction.

457 N.E.2d at 425. But the entire exercise has been prohibited by this Court, which recently instructed as follows in *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992):

> "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. See, *e.g.*, *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-242 (1989); *United States v. Goldenberg*, 168 U.S. 95, 102-103 (1897); *Oneale v. Thornton*, 6 Cranch 53, 68 (1810). When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' *Rubin v. United States*, 449 U.S. 424, 430 (1981); see also *Ron Pair Enterprises, supra*, at 241."

It has been observed that "legislative history" is a poor indicator of statutory meaning because committee reports can only (at best) reflect the thoughts of a "handful of the Members of Congress", whereas the meaning "most in accord with context and ordinary usage" is "most likely to have been understood by the *whole* Congress which voted on the words of the statute . . . ." *Green v. Bock Laundry Machines Co.*, 490 U.S. 504, 528 (1988) (Scalia, J., concurring). Thus, as held in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98-99 (1991):

> "As we have observed before, however, the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. See *Rodriguez v. United States*, 480 U.S. 522, 525-526, 107 S.Ct. 1391, 1393-1394, 94 L.Ed.2d 533 (1987). The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous - that has a clearly accepted meaning in both legislative and judicial practice - *we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.*" (Emphasis added.)

A "plain meaning" approach is especially appropriate for construction of the Bankruptcy Code. As noted by Justice Blackmun in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989):

> "Initially, it is worth recalling that Congress worked on the formulation of the Code for nearly a decade. It was intended to modernize the bankruptcy laws, see H.R. Rep. No. 95-595, p.3 (1977) (Report), and as a result made significant changes in both the substantive and procedural laws of bankruptcy. See *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 52-53 (1982) (plurality opinion). In particular, Congress intended 'significant changes from current law in . . . the treatment of secured creditors and secured claims.' Report, at 180. *In such a substantial overhaul of the system, it is not appropriate or realistic to expect Congress to have explained with particularity each step it took. Rather, as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.*" (Emphasis added.)

In this regard, see Kelch, *An Apology for Plain Meaning Interpretation of the Bankruptcy Code*, 10 Bankr. Dev. J. 289, 314-330 (1994) (e.g., the "Code is detailed and precise in its comprehensive treatment of the law of insolvency" and is therefore "more suitable" for "plain-meaning analysis of the structure"; unlike a statute such as the UCC "there is no statement by Congress concerning the interpretive design to be applied to the code"; and "inasmuch as the Code affects "property interests", which "are of a fundamental nature", a strong burden is required to weaken those rights and "this burden can be provided by application of the plain-meaning rule.").

A case directly in point is *Patterson v. Shumate*, 504 U.S. 753 (1992), wherein this Court was called upon to construe the phrase "applicable non-bankruptcy law", which phrase appears, among other places, in §108(c). In *Patterson* the focus was upon

11 U.S.C. §541(c)(2), which excludes from the bankruptcy estate property of the debtor that is subject to a restriction on transfer enforceable under "applicable non-bankruptcy law." The issue was whether or not an anti-alienation provision in a pension plan, required for ERISA qualification (29 U.S.C. §1056(d) (1)), constituted a restriction on transfer enforceable under "applicable non-bankruptcy law." The bankruptcy trustee argued that "non-bankruptcy law" embraced only state law, not federal law, such as ERISA. Speaking for a unanimous Court, Justice Blackmun rejected the trustee's argument:

> "Nothing in §541 suggests the phrase 'applicable non-bankruptcy law' refers, as petitioner contends, exclusively to state law. The text contains no limitation on 'applicable non-bankruptcy law' relating to the source of the law. Reading the term 'applicable non-bankruptcy law' in §541(c)(2) to include federal as well as state law comports with the other references in the Bankruptcy Code to sources of law. The Code reveals, significantly, that Congress, when it desired to do so, knew how to restrict the scope of applicable law to 'state law' and did so with some frequency." 504 U.S. at 758.

In the same fashion, there is nothing about the ordinary usage or the context of the phrase "any suspension", as utilized in §108(c) (1), which contains a limitation relating to the "source" of such a suspension. Decisional law is presumptively as legitimate a source of limitation tolls and suspensions as is statutory law. Thus, we contend that the construction of the applicable phrase, by the Second Circuit below, was too narrow.

C. The Common Law has Long Provided for Suspensions of Limitation Periods Where Circumstances Block Persons From Enforcing Their Rights.

This Court has recognized "that the running of a statute of limitation may be suspended by causes not mentioned in the statute itself." *Braun v. Saurwein*, 77 U.S. 218, 223 (1869).

More recently, it has been observed that "In recognizing judicial power to toll statutes of limitations in federal courts we are not breaking new ground." *American Pipe & Construction Co. v. Utah*, 414 U.S. 539, 558 (1974). To the same effect is *Glus v. Brooklyn Eastern Terminal*, 359 U.S. 231 (1959).

Courts have created tolls in a variety of factual settings. Thus, the lack of an available tribunal suspends the running of a limitation period, *O'Hara v. State of New York*, 112 N.Y. 146, 154 (1889), as does the outbreak of war in the relevant jurisdiction. *Hanger v. Abbott*, 6 Wall. 532, 541-42 (1867). Particularly relevant for the instant case is the following general rule, recently repeated by the Supreme Court of Arkansas in *Ragland v. Alpha Aviation, Inc.*, 285 Ark. 182, 686 S.W.2d 391, 393 (1985):

> "Where an individual is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his right . . . . 54 C.J.S., Limitations of Actions § 247."

Standing for the same proposition are *Jackson v. Johnson*, 950 F.2d 263, 265 (5th Cir. 1992), and *Pizel v. Zuspann*, 795 P.2d 42, 55 (Sup.Ct. Kansas 1990). See also cases collected at 54 C.J.S. *Limitations of Actions* §121 and 51 Am.Jur.2d *Limitation of Actions* §170.

Pursuant to this general rule, courts have suspended statutes of limitation where, for example, a litigant was instructed by a federal court to exhaust his state remedies before proceeding with a civil rights action under 42 U.S.C. §1983, *Jackson*, *supra*, at 266; where the validity of a claim might be affected by the result of a pending appeal in a related action, *Pizel*, *supra*, at 56, *Walker v. Hanes*, 570 S.W.2d 534, 540 (Ct. Civ. App. Texas 1978), and *Archer v. Edwards*, 65 P.2d 115, 116-17 (Dis.Ct. App. California 1937); where the plaintiff was involved in proceedings relating to its insolvency, *McGee v. Kirby*, 118 P.2d 199 (Sup. Ct. Oklahoma 1941); where related administrative

proceedings are pending, *Mt. Hood Stages v. Greyhound Corp.*, 616 F.2d 395, 399-401 (9th Cir. 1980), *cert. denied* 449 U.S. 831 (1980), and *Timoni v. United States*, 419 F.2d 294, 302 (D.C. Cir. 1969); where the amount of funds in the defendant's estate had not yet been determined, *Brown Estate*, 152 Pa.Sup.Ct. 252, 254-55 (1943); where a mortgagee had been enjoined from foreclosing his mortgage, *Hill v. Grand Lodge of I.O.O.F.*, 157 Kan. 34, 40, 138 P.2d 438 (1943); and where an action may not be commenced without first obtaining leave to sue, *Creswell v. Doe and MVAIC*, 22 A.D.2d 942, 255 N.Y.S.2d 946, 947 (App.Div. 2d Dept. 1964).

We submit that 11 U.S.C. §108 (c) should not be construed to compromise this wealth of decisional law, all to the effect that a limitation suspension is granted where a litigant is blocked in the pursuit of his legal rights. In this regard, it should be remembered that statutes in derogation of the common law are strictly construed. *United States v. Texas*, 113 S.Ct. 1631, 1634 (1993); *Shaw v. Railroad Company*, 101 U.S. 557, 565 (1879); *In re Liberatore*, 574 F.2d 78, 85 (2d Cir. 1978); *United States v. Mead*, 426 F.2d 118, 123 (9th Cir. 1970); and *Bauers v. Heisel*, 361 F.2d 581, 587 (3d Cir. 1966), *cert. denied* 386 U.S. 1021 (1967).

In accordance with this longstanding line of decisional law, we respectfully submit that the court below erred in not recognizing a suspension of the statute of limitations during the pendency of the bankruptcy stay. Instead, the court should have followed the holdings in *Garbe Iron Works, Inc. v. Priester*, 9 Ill.2d 84, 457 N.E.2d 422 (Sup.Ct. Ill. 1983), *In re Hunters Run Ltd. Partnership*, 875 F.2d 1425 (9th Cir. 1989), *McKinney v. Waterman S.S. Corp.*, 925 F.2d 1 (1st Cir. 1991), and all of the other authority to like effect discussed above under heading A.

D. If a Suspension is Available Under Common Law, *A Fortiori* it is Available under Maritime Law Which is Especially Solicitous of Seamen's Rights.

This Court has historically recognized "that unique hazards emphasized by unusual tenure and control attend the work of seamen", and, "accordingly, with the combined object of encouraging marine commerce and assuring the well-being of seamen, maritime nations uniformly have imposed broad responsibilities for their health and safety upon the owners of ships." *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 727-28 (1943). The dangers of maritime employment also led this Court to develop "a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages." *Moragne v. States Marine Lines*, 398 U.S. 375, 387 (1970). It is often noted that "seamen are the wards of the admiralty . . . ." *Socony-Vacuum Co. v. Smith*, 305 U.S. 424, 431 (1938); *The Arizona v. Anelich*, 298 U.S. 110, 123 (1935).

Unlike shoreside workers, seamen do not have a workmen's compensation remedy. They must seek redress for their personal injuries by proving negligence under the Jones Act (46 U.S.C. §688) or a breach of the warranty of seaworthiness under the General Maritime Law. In *Cosmopolitan Co. v. McAllister*, 337 U.S. 783, 790 (1949), this Court recognized that "The Jones Act was welfare legislation . . . ." and, as such, "this statute is entitled to a liberal construction to accomplish its beneficent purposes." To the same effect is *Cortes v. Baltimore Insular Line*, 287 U.S. 358, 367 91932), and *Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930). As a result, "it is a settled canon of maritime jurisprudence that 'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.'" *American Export Lines. Inc. v. Alvez*, 446 U.S. 274, 281-82 (1980), quoting, with approval, *The Sea Gull*, 21 F.Cas. 909, 910 (No.12,578) (CC MD 1965).

We submit that this established maritime jurisprudence compels the conclusion that, if a limitation suspension would

obtain upon the instant facts at common law, then, *a fortiori* such a suspension must obtain under the General Maritime Law, which is nothing more than the common law of the sea. *United States v. Webb, Inc.*, 397 U.S. 179, 191 (1969); Gilmore and Black, *The Law of Admiralty* (2d Ed. 1975), pp.45-47.

Indeed, maritime law has traditionally provided tolls for seamen where fairness called for that result. *Osbourne v. United States*, 164 F.2d 767, 769 (2d Cir. 1947). But the true flexibility and generous scope of the maritime toll is best demonstrated by this Court's decision in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965). The plaintiff in *Burnett* was a railroad worker, and brought his action pursuant to the Federal Employers' Liability Act (the FELA), 45 U.S.C. §51 *et seq*. As a threshold matter, it should be noted that the Jones Act incorporates, by reference, "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railroad employees . . . ." 46 U.S.C. §688. And this Court has held that this reference to the FELA draws into the Jones Act "the entire judicially developed doctrine of liability granted to railroad workers by the FELA." *Kernan v. American Dredging Co.*, 355 U.S. 426, 439 (1958).

The plaintiff railroad worker in *Burnett* commenced a timely FELA suit in Ohio state court. Upon later motion by the defendant railroad, the suit was dismissed for improper venue. Eight days later, the plaintiff brought an identical action in an Ohio federal district court. By this time, more than three years had expired since the date of the accident, and the plaintiff's action was now dismissed as time barred. This Court reversed, noted that "the FELA limitation period is not totally inflexible but, under appropriate circumstances, . . . may be extended beyond three years." 380 U.S. at 427. A toll was appropriate for these reasons:

> "Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost,

> memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim *it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.' Order of Railroad Telegraphers v. Railway Express Agency*, Inc., 321 U.S. 342, 348-349. Moreover, *the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.*
>
> This policy of repose, designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights . . . ."
>
> * * *
>
> "Considerations in favor of tolling the federal statute of limitations in this case are similar to those leading to an extension of the limitation period in the cases mentioned above. *Petitioner here did not sleep on his rights but brought an action within the statutory period in a state court of competent jurisdiction. Service of process was made upon the respondent notifying him that petitioner was asserting his cause of action.*" 380 U.S. 428-29 (emphasis added).

The plaintiff herein, Mr. Skywark, should fare no worse than the plaintiff in *Burnett*. Mr. Skywark did not "sleep on his rights." He filed a proof of claim in the Bankruptcy Court nine months after the date of his injury (30, 40). And the instant action was commenced less than three months after the Trustee notified plaintiff that the stay had been lifted (12, 33, 39-41).

Furthermore, the Trustee received full notice of the particulars of plaintiff's claim, engaged in settlement negotiations (47), and acknowledged that he had performed "a through review of all pertinent factors relating to this claim . . . ." (72). Thus the "fairness to defendants", so critical in *Burnett*, was more than satisfied in this case. Further authority for the proposition that a toll is warranted where the plaintiff "does not sleep" and the

defendant receives notice is provided by *Mt. Hood Stages, supra*, 616 F.2d at 400-1, and *Hourly Messengers v. Ins. Co. of North America*, 163 N.J.Super. 276, 394 A.2d 880, 882 (App.Div. 1978)..

In closing, we should make note of the argument, adopted in *Aslanidis* and by the court below, that the plaintiff seamen were not absolutely prevented from commencing suit within 3 years of their injuries because each had the power to move, in the Bankruptcy Court, for a lifting of the automatic stay (3a). However, we submit that the argument does not withstand analysis. In the first place, it "assumes relief from the stay would have been granted." *In re Hunters Run Ltd. Partnership, supra*, 875 F.2d at 1428. Furthermore, the argument ignores the state of the law at the time Mr. Skywark's claim was subject to the bankruptcy stay. Neither plaintiff nor his attorney had any reason to believe that the statute of limitations had *not* been tolled. The decision in *Aslanidis* was not rendered for more than a year *after* the stay had been lifted below (33). As noted above in the argument under heading A, before *Aslanidis* there was no appellate authority holding that a bankruptcy stay did not create a toll. Indeed, the only appellate court to have spoken on this issue in the context of a Jones Act proceeding was *McKinney, supra*, and the First Circuit there had strongly indicated that the 3 year statute of limitations had been suspended for "the full period that the automatic stay was in effect . . . ." 925 F.2d at 3.

In any event, the cases make it clear that, depending upon the circumstances, a toll may be granted even where the plaintiff is not absolutely precluded from taking legal action to enforce his rights. That is certainly apparent from *Burnett*, where nothing had prevented the plaintiff railroad worker from bringing a properly lodged action, either in state or federal court, before the three year period had expired. Likewise, in *Pizel, supra*, nothing prevented the plaintiff from commencing his action during the period of the toll. The action in question was based upon legal malpractice in drafting an invalid trust. The invalidity of that trust had been established at the trial level, but the statute of

limitations respecting the legal malpractice action was tolled until that result was finally affirmed by the Supreme Court of Kansas. In the later malpractice action, the Supreme Court concluded that the toll was proper while the *vitality* of the legal malpractice claim was still at issue. As the Court reasoned:

> "The plaintiffs were *effectively precluded* from bringing this action against Zuspann and Whalen [the attorneys] until a final determination was made on the appeal. Until that final determination was made, *the plaintiffs could have filed, but not prosecuted, this action to a successful conclusion.* In the event the Court of Appeals or this court would have reversed the trial court, the plaintiffs would have had no cause of action against Zuspann or Whalen." 795 P.2d at 56 (emphasis added).

Standing for the same proposition are *Creswell, supra* and *McGee, supra.*

There is also the consideration of "efficiency", which played a significant role in this Court's decision in *American Pipe, supra.* It was there held that the filing of a class action tolled the statute of limitations respecting the commencement of individual suits by intervention sought after the class had been disallowed. The pertinent reasoning was as follows:

> "*A contrary rule* allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit *would deprive Rule 23 class actions of the efficiency and economy of litigation* which is a principal purpose of the procedure. *Potential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable.* In cases such as this one, where the determination to disallow the class action was made upon considerations that may vary with such subtle factors as experience with prior similar litigation or the current status of a court's docket, a rule requiring successful anticipation

> of the determination of the viability of the class would breed needless duplication of motions. We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 553-554 (emphasis added).

In the same fashion, the rule which now prevails in the Second Circuit will work to encourage motions to lift the bankruptcy stay whenever the applicable statute of limitations is about to expire. Thus, the purpose of the Bankrupcty Code in providing the Trustee and the debtor with a respite from litigation respecting claims is defeated. We submit that this Court should not sanction a policy that "would breed needless duplication of motions," but should rather adopt the result here contended for by plaintiff Skywark, thus enhancing both the efficiency and uniformity of bankruptcy and maritime law.

CONCLUSION

For the above-stated reasons, the petition for certiorari should be granted.

Respectfully submitted,

BERNARD A. HELFAT
Attorney for Petitioner
100 Maiden Lane
New York, New York 10038
(212) 504-6080, 6060

FRED R. PROFETA, JR
MICHAEL J. ORLOFSKY
Of Counsel

APPENDIX

Opinion and Order of the United States Court of Appeals for the Second Curcuit

United States Court of Appeals for the Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of May, one thousand nine hundred and ninety-five.

94-9027

Present—HON. JON O. NEWMAN,
Chief Judge
RICHARD J. CARDAMONE,
FRED I. PARKER
Circuit Judges

PETER SKYWARK,
Plaintiff-Appellant,

v.

UNITED STATES LINES, INC., and
UNITED STATES LINES (S.A.) INC.,
and REORGANIZATION TRUST,
Defendants-Appellees.

Order

Appeal from the United States District Court for the Southern District of New York (Thomas P. Griesa, Chief Judge).

This cause came on to be heard on the transcript of record from the United States District Court of the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Plaintiff Peter Skywark appeals from the judgment entered on September 14, 1994, which granted summary judgment to

defendants United States Lines, Inc. and United States Lines (S.A.) Inc. Reorganization Trust (collectively, "U.S. Lines") on a statute of limitations defense and dismissed Skywark's complaint as time-barred.

Skywark alleges that he was injured on August 14, 1986, while he was a crew member of a vessel operated by U.S. Lines. Shortly thereafter, on November 24, 1986, U.S. Lines filed a voluntary bankruptcy petition in the Southern District of New York. Pursuant to 11 U.S.C. § 362 (a)(1), Skywark was then automatically stayed from commencing suit on his pre-petition cause of action against U.S. Lines. On May 14, 1987, Skywark filed a proof of claim in the Bankruptcy Court. Thereafter, negotiations between Skywark and U.S. Lines failed to produce a settlement on his claim, and, on motion of U.S. Lines, the Bankruptcy Court terminated the automatic stay as it applied to that claim. Skywark received notice of the termination order on August 12, 1992. Under 11 U.S.C. §108(c)(2), he then had 30 days to file the suit that had been blocked by the stay, unless the original limitations period plus any nonbankruptcy suspension allowed a longer time. On November 12, 1992, three months after Skywark received notice that the stay had been terminated, and more than six years after the events giving rise to Skywark's claims, Skywark commenced this suit in the District Court with a complaint alleging tort causes of action under the Jones Act and general maritime law. The District Court granted U.S. Lines' motion for summary judgment on a statute of limitations defense, and entered judgment dismissing Skywark's complaint. This appeal followed.

Skywark's maritime tort claims are concededly subject to a three-year statute of limitations, which, if not tolled or extended, had expired well before he commenced this action. Skywark contends that his claims are not time-barred, because maritime law provides for tolling of the limitations period while a plaintiff is prevented from bringing suit due to the automatic bankruptcy stay, and this non-bankruptcy tolling rule is incorporated by reference into the extension of time provision of the Bankruptcy Code, 11 U.S.C. § 108(c) (1).

This argument was rejected on almost identical facts in *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1074-75 (2d Cir. 1993), which held that maritime law does not provide for tolling during pendency of bankruptcy, because "in the bankruptcy arena . . . plaintiffs have advance knowledge of when claims are to expire and may act to protect themselves," *id.* at 1074. The reasoning of *Aslanidis* is equally valid whether the plaintiff or the defendant moves to lift the automatic stay. In either case, the plaintiff is aware before the stay is lifted that he has a cause of action against the defendant, since he would previously have filed a proof of claim in the Bankruptcy Court, and he has at least thirty days in which to file suit after receiving notice that the stay has been lifted, see 11 U.S.C. § 108(c)(2). Although brief, the thirty-day extension assures that the automatic stay is not an external force beyond plaintiff's control that disables him from suing, *see Aslanidis*, 7 F.3d at 1074, and maritime law therefore does not provide for tolling while the automatic stay is in effect.

We also reject Skywark's contention that the USL Reorganization Trustee had a fiduciary duty to inform him that section 108(c) itself extends the time for filing suit for only thirty days after the automatic stay is lifted. The duties imposed on U.S. Lines and the Reorganization Trustee by the Bankruptcy Court, including the duty to use reasonable efforts to assure that insurance rights were not lost by virtue of the reorganization of the corporation and its affiliates, *see* First Amended and Restated Joint Plan of Reorganization art. VII.A.1, at 13-14 (Feb. 23, 1989), and the duty to attempt to settle the claims of personal injury claimants by good-faith negotiation, *see* Order Extending the Automatic Stay, etc., at 3-6 (Apr. 18, 1990), did not make U.S. Lines or the Trustee the fiduciary of personal injury claimants for purposes of prosecuting their claims. U.S. Lines' motion to lift the stay after negotiations had failed to produce a settlement was perfectly proper. *See id.* at 6.

Finally, because *Aslanidis* applied its holding to the parties before it, we may not selectively choose not to apply that holding retroactively to Skywark. *See Harper v. Virginia*

Department of Taxation, 113 S.Ct. 2510, 2516-18 (1993); *Welch v. Cadre Capital*, 946 F.2d 185, 186 (2d Cir. 1991).

Because the three-year statute of limitations applicable to Skywark's claims was not suspended by any nonbankruptcy rule of tolling and therefore expired before the automatic stay was lifted, and because Skywark did not commence his action within the thirty-day extension of time provided by section 108(c)(2), his suit was time barred.

/S/ JON O. NEWMAN
Chief Judge

/S/ RICHARD J. CARDAMONE

/S/ FRED I. PARKER
Circuit Judges

Judgment of United States District Court for the Southern District of New York Granting Defendants' Motion for Summary Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
92 Civil 8197 (TPG)

PETER SKYWARK,

Plaintiff,

-against-

UNITED STATES LINES, INC., and
UNITED STATES LINES (S.A.) INC.
REORGANIZATION TRUST,

Defendants.

Defendants having moved for summary judgment dismissing the complaint on the ground that it is barred by the statute of limitations, and the said motion having come before the Honorable THOMAS P. GRIESA, U.S.D.J., and the Court thereafter on September 9, 1994, having rendered its opinion (#73662); granting defendants' motion for summary judgment dismissing the complaint as barred by the statute of limitations, it is,

ORDERED, ADJUDGED AND DECREED: That defendants' motion for summary judgment be and it is hereby granted, and it is further,

ORDERED, that the complaint be and it is hereby dismissed as barred by the statute of limitations.

Dated: NEW YORK, NEW YORK
September 14, 1994

This document was Entered
on the Docket on
September 14, 1994.

JAMES M. PARKISON
Clerk
/S/
Deputy Clerk

Opinion of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

92 Civ. 8197 (TPG)

PETER SKYWARK,
Plaintiff,
-against-
UNITED STATES LINES, INC., and
UNITED STATES LINES (S.A.) INC.
REORGANIZATION TRUST,
Defendants.

This is a seaman's action claiming negligence and unseaworthiness. The injury occurred on August 14, 1986. The action was not filed until November 12, 1992. Defendants move for summary judgment dismissing the complaint on the ground that it is barred by the statute of limitations.

FACTS

In 1986 plaintiff was employed by United States Lines and on August 14 was seriously injured when he was struck in the head by a piece of equipment. He was serving at that time on the S.S. AMERICAN GEORGIA.

On November 24, 1986 defendants United States Lines, Inc. and United States Lines (S.A.) Inc. filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. These petitions were filed in the United States Bankruptcy Court for the Southern District of New York. On the same day the Bankruptcy Court entered a restraining order prohibiting commencement or continuation of suit on all pre-petition causes of action against Debtors. There was also, of course, the automatic stay of actions by operation of law. By this time plaintiff had not filed any action based on the August 1986

accident, and the stay and restraining order prevented him from doing so. However, plaintiff filed a proof of claim in the bankruptcy proceeding on May 14, 1987.

The bankruptcy proceeding resulted in a reorganization. On August 6, 1992 the Bankruptcy Court entered an order terminating the automatic stay and restraining order. Plaintiff's attorney received notice of this on August 17, 1992. The effect was to allow plaintiff to commence a lawsuit based upon his personal injury claim, subject to a time limit to be discussed hereafter.

Plaintiff commenced the present action on November 12, 1992.

DISCUSSION

It is conceded that the normal limitation period for plaintiff's negligence and unseaworthiness claims was three years. This three-year period expired on August 13, 1989. However, the automatic stay and a restraining order in the bankruptcy proceeding intervened and prevented any suit by plaintiff from November 24, 1986 until August 6, 1992.

Section 108(c) of the Bankruptcy Code provides:

> . . . [I]f applicable non-bankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of -
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) 30 days after notice of the termination or expiration of the stay . . . with respect to such claim.

11 U.S.C. § 108(c). Thus a plaintiff may bring a civil action against a debtor within the regular limitation period or up to 30 days after notice of the termination of the bankruptcy stay, whichever is later.

Since the regular limitation period expired long before the termination of the bankruptcy stay, plaintiff in the present case

had until 30 days after notice of that termination to commence a civil action, that is until 30 days after August 17, 1992, or until September 16, 1992. The suit was not filed until November 12, 1992.

Under the plain language of 11 U.S.C. § 108(c) plaintiff is time barred. It has been held in this circuit that § 108(c) does not toll a statute of limitations but simply grants the specified extension where the statute of limitations expires during a bankruptcy stay. *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067 (2d Cir. 1993). Plaintiff has advanced several arguments seeking to avoid the effect of § 108(c) as interpreted by *Aslanidis*. But the statutory language is perfectly clear and unambiguous. There is no basis whatever for departing from it or failing to enforce it.

Defendants' motion for summary judgment dismissing the complaint as barred by the statute of limitations is granted.

SO ORDERED.

Dated: New York, New York
September 8, 1994

/S/ THOMAS P. GRIESA
Thomas P. Griesa
U.S.D.J.

(2)

No. 95-300

Supreme Court, U.S.
FILED
SEP 20 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PETER SKYWARK,

Petitioner,

—v.—

UNITED STATES LINES, INC. AND UNITED STATES LINES (S.A.) INC. REORGANIZATION TRUST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JEREMY J. O. HARWOOD
Counsel of Record
HEALY & BAILLIE
29 Broadway
New York, New York 10006-3293
(212) 943-3980

Attorneys for Respondent

Of Counsel:

PHILIP S. LA PENTA

26 pp

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to this proceeding are Petitioner Peter Skywark and Respondent the United States Lines, Inc. & United States Lines (S.A.) Inc. Reorganization Trust (the "Trust"). The Trust is a successor-in-interest to United States Lines, Inc. and United States Lines (S.A.) Inc. It has no parent companies or subsidiaries.

TABLE OF CONTENTS

PAGE

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

COUNTER-STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 5

A. THE SECOND CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S READING OF THE PLAIN LANGUAGE OF THE CODE WAS NOT ERRONEOUS AND DOES NOT RAISE AN IMPORTANT, UNSETTLED ISSUE OF LAW 5

B. THE SECOND CIRCUIT'S DECISION CREATES NO CONFLICT WITHIN THE CIRCUITS 5

C. THE SECOND CIRCUIT DID NOT ENGAGE IN ANY EXAMINATION OF LEGISLATIVE HISTORY IN BREACH OF RULES OF STATUTORY CONSTRUCTION 13

D. THE "APPLICABLE NONBANKRUPTCY LAW" FIXING THE THREE YEAR PERIOD FOR MARITIME TORT CLAIMS DOES NOT INCLUDE SUSPENSION BY EQUITABLE TOLLING 15

CONCLUSION 18

TABLE OF AUTHORITIES

Cases: PAGE

Aslanidis v. United States Lines, Inc., 7 F.3d 1067 (2d Cir. 1993) 6, 7, 9-16

Banque Arabe v. Maryland Nat. Bank, 850 F. Supp. 1199 (S.D.N.Y. 1994), aff'd 57 F.3d 146 (2d Cir. 1995) . 14

Connecticut Nat. Bank v. Germain, 503 U.S. 249 (1992) 5, 13

Easley v. Pettibone Michigan Corp., 990 F.2d 905 (6th Cir. 1993) 7

Farm Credit Bank of Texas v. Vallee, 148 B.R. 1021 (W.D. La. 1992) 7

G.W. White & Son, Inc. v. Tripp, 1995 W.L. 65058 (N.D.N.Y. 1995) 7

Garbe Iron Works, Inc. v. Priester, 99 Ill. 2d 84, 457 N.E.2d 422 (1983) 10, 11

Grotting v. Hudson Shipbuilders, Inc., 85 B.R. 568 (W.D. Wash. 1988) 6, 8, 10, 17

In re Baird, 63 B.R. 60 (Bankr. W.D.Ky. 1986) 6, 10

In re Chemisphere Partners, 90 B.R. 380 (Bankr. N.D. Ill. 1988) 12

In re Coan, 96 B.R. 828 (Bankr. N.D. Ill. 1989) 12

In re Crysen/Montenay Energy Co., 166 B.R. 546 (S.D.N.Y. 1994) 7

In re Deices, 137 B.R. 51 (Bankr. S.D. Cal. 1992) 7

In re Design Builders, 18 B.R. 392 (Bankr. D. Idaho 1981) 12

In re Houts, 23 B.R. 705 (Bankr. W.D. Mo. 1982) 12

In re Hunters Run, Ltd Partnership, 875 F.2d 1425 (9th Cir. 1989) 8, 9

In re Morton, 866 F.2d 561 (2d Cir. 1989) 8, 9

In re New England Carpet Co., 26 B.R. 934 (Bankr. Vt. 1983) 12

In re Phillips Construction Co., Inc., 579 F.2d 431 (7th Cir. 1978) 9

In re Richards, 994 F.2d 763 (10th Cir. 1993) 10

In re Victoria Grain Co., 45 B.R. 2 (Bankr. Minn. 1984) . 12

In re Warren 192 F. Supp. 801 (W.D. Wash. 1961) 9

In re West, 5 F.3d 423 (9th Cir. 1993) 15

J.T. Industrial Contractors, Inc. v. Hargis Railcar, Inc., 458 S.E.2d 702 (Ga. Ct. App. 1995) 8

Major Lumber Co. v. G&B Remodeling, Inc., 817 S.W.2d 474 (Mo. Ct. App. 1991) 11

Mamer v. Apex R.E. & T., 852 F.Supp. 870 (E.D. Mo. 1994), aff'd 59 F.3d 780 (8th Cir. 1995) 7, 16

McKinney v. Waterman S.S. Corp., 925 F.2d 1 (1st Cir. 1991) 9, 16

Moser v. Universal Engineering Corp., 11 F.3d 720 (7th Cir. 1993) 7

Motor Vehicle Mfrs. v. N.Y.S. Dept. of Env. Cons., 17 F.3d 521 (2d Cir. 1994) 14

Nova Bennett v. U.S. Lines, Inc., __ F.3d __, 1995 W.L. 497705 (2d Cir., August 22, 1995) (No. 94-9108, 1654) 7, 9, 10

O'Lane v. Spinney, 874 P.2d 754 (Sup. Ct. Nev. 1994) ... 8

Pettibone Corp. v. Easley, 935 F.2d 120 (7th Cir. 1991) .. 7

Rahim v. McNary, 24 F.3d 440 (2d Cir. 1994) 14

Raikes v. Langford, 701 S.W.2d 142 (Ky.Ct.App. 1986) .. 8

Rogers v. Corrosion Products, Inc., 42 F.3d 292 (5th Cir. 1995), cert. denied 115 S.Ct. 2614 (1995) . 7, 10-14

Swartzman v. Harlan, 535 So.2d 605 (Fla. App. 2 Dist. 1988) 8

United States v. Johnston, 268 U.S. 220 (1925) 17

Wells v. California Tomato Juice Inc., 118 P.2d 916 (Cal. Ct.App. 1941) 11

Wetzler v. F.D.I.C., 38 F.3d 69 (2d Cir. 1994) 14

Statutes:

11 U.S.C. §§ 101 et seq. 2

11 U.S.C. § 105(a) 10

11 U.S.C. § 108(c) 5-17

11 U.S.C. § 108(c)(1) 6, 10, 15-17

11 U.S.C. § 108(c)(2) 7, 8, 15

11 U.S.C. § 362(a) 2

11 U.S.C. § 507(a)(7)(A)(ii) 10

26 U.S.C. § 6503 10

26 U.S.C. § 6503(h)(2) 15

28 U.S.C. § 157(b)(5) 3

45 U.S.C. § 56 15

46 U.S.C. § 763a 15

Other Materials:

124 Cong. Rec. H11,109 (daily ed. Sept. 28, 1978) 6

2 Lawrence P. King, Collier on Bankruptcy
(15th ed. 1993) 6, 17

H.R. Rep. No. 595, 95th Cong., 1st Sess. 318,
reprinted in 1978 U.S.C.C.A.N. 5787, 6275 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-300

PETER SKYWARK,

Petitioner,

--- v. ---

UNITED STATES LINES, INC. AND UNITED STATES LINES (S.A.) INC. REORGANIZATION TRUST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The United States Lines, Inc. and United States Lines (S.A.) Inc. Reorganization Trust respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

COUNTER-STATEMENT OF THE CASE

United States Lines, Inc. ("Debtor") filed a voluntary petition for relief under Chapter 11 of Title 11, United States Code, 11 U.S.C. §§ 101 et seq. (the "Code"), on November 24, 1986, in the Bankruptcy Court. That Court entered a restraining order pursuant to the Code's automatic stay provision, 11 U.S.C. § 362(a) (the "Stay"), prohibiting commencement or continuation of suit on all pre-petition causes of action against the Debtor (the "Restraining Order", 13-16)[1].

Petitioner, Skywark filed a proof of claim, thereby submitting to the Bankruptcy Court's jurisdiction over his claim (the "Claim"). (30).

Thereafter, Debtor (and its co-debtors) proposed a plan of reorganization pursuant to the terms of the Code. Debtor's First Amended and Restated Joint Plan of Reorganization (the "Plan") was approved and confirmed by an order of the Bankruptcy Court dated May 16, 1989 (the "Confirmation Order"). (17-20). Under the Plan all of Debtor's assets were transferred to the United States Lines, Inc. and United States Lines (S.A.), Inc. Reorganization Trust (hereinafter the "Trust") as successor-in-interest to both Debtor and its co-debtor, United States Lines (S.A.), Inc.

Petitioner has omitted to state that the Plan provided a specific method to resolve pre-petition personal injury and

---

[1] Numbers in parentheses with nothing more refer to pages in the Joint Appendix, filed with the United States Court of Appeals for the Second Circuit. Numbers followed by "a" refer to pages in the Appendix reprinted in the Petition.

wrongful death claims (collectively "personal injury claims"). Paragraph 8 of the Confirmation Order provided that the Restraining Order should remain in full force and effect, subject to extension upon application to the Bankruptcy Court. (18). The Bankruptcy Court also entered an order dated April 18, 1990 extending the Stay and its Restraining Order and establishing a claims settlement program for pre-petition personal injury claims (the "P.I. Order", 21-29).

The P.I. Order also provided:

> (g) If a settlement is not reached within the 60-day review period set forth in paragraph (e) above, **upon notice to the other parties to the proceedings, either the claimant or the Reorganization Trustee may move this Court to terminate the automatic stay and the Restraining Order**. The Court may grant said relief if in its determination the moving party has complied in good faith with the claims resolution procedures set forth herein. If the Court determines otherwise, it may order the Debtors and claimants to so comply and/or grant such other relief as it deems appropriate. **Upon the termination of the automatic stay and the Restraining Order, the personal injury claimants shall be free to commence an action against the Reorganization Trust in accordance with 28 U.S.C. Section 157(b)(5)**. [emphasis added]

(26, ¶(g)).

This provision is significant because Petitioner argues that it would be wrong to assume that if he had moved for relief from the Stay, such relief would have been granted. (Pet. at 21). The P.I. Order expressly provides for relief from the Stay after a failed settlement attempt, as occurred. Moreover, after Skywark's counsel rejected the Trust's settlement offer, the Trust, by letter dated August 16, 1990 asked "when [Skywark] would move in the U.S. Bankruptcy Court to lift the stay in order to proceed with litigation of this case . . .". (78). Petitioner omits mention of this letter. Because Skywark's counsel did not reply to the Trust or take any other action to prosecute the Claim for eighteen months, the Trust itself moved to vacate the Stay. The Trust, by letter to Skywark's counsel dated January 31, 1992, set a deadline for acceptance of the settlement offer and stated it would thereafter move to lift the Stay. (78).

After the settlement deadline passed the Trust moved to terminate the Stay and Restraining Order in respect of the claims of Skywark and one other claimant, with notice to their counsel. The Bankruptcy Court entered a consent order dated August 6, 1992 terminating the Stay (the "Lift Stay Order", 31-32). The Lift Stay Order was solely in respect of these two personal injury claimants, not all creditors, as Petitioner implies. (Pet. at 5). Moreover, the Lift Stay Order recorded that notice of the Trust's application had been provided to Skywark's counsel and that no objections had been received from him. (31-32).

REASONS FOR DENYING THE WRIT

A. THE SECOND CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S READING OF THE PLAIN LANGUAGE OF THE CODE WAS NOT ERRONEOUS AND DOES NOT RAISE AN IMPORTANT, UNSETTLED ISSUE OF LAW

In Chief Judge Griesa's opinion for the United States District Court for the Southern District of New York he determined that Skywark's counsel received notice of the Lift Stay Order on August 17, 1992 but failed to commence the action until November 12, 1992. (80). He therefore held that "[u]nder the plain language of 11 U.S.C. § 108(c) plaintiff is time barred" and that the "statutory language [of § 108(c)] is perfectly clear and unambiguous." (82). The District Court's reading of the "plain language" of § 108(c) was based on the presumption that "a legislature says in a statute what it means and means in a statute what it says there [citations omitted]." Connecticut Nat. Bank v. Germain, 503 U.S. 249, 254 (1992). The Second Circuit correctly affirmed in a unanimous opinion. (1a-4a) .

B. THE SECOND CIRCUIT'S DECISION CREATES NO CONFLICT WITHIN THE CIRCUITS

Petitioner asserts that the "central issue in this case is one upon which the various Courts of Appeal are in conflict." (Pet. at 11). This issue is said to be whether applicable statutes of limitation "are tolled during the pendency of a bankruptcy

stay" by virtue of 11 U.S.C. § 108(c). (Pet. at 10). There is, however, no Circuit conflict in the application of the plain language of § 108(c). As the Second Circuit stated in Aslanidis v. United States Lines, Inc., 7 F.3d 1067, 1073 (2d Cir. 1993):

> The reference in § 108(c)(1) to "suspension" of time limits clearly does not operate in itself to stop the running of a statute of limitations; rather, this language merely incorporates suspensions of deadlines that are expressly provided in **other** federal or state statutes.
>
> Any ambiguity with respect to this "suspension" reference in § 108(c)(1) is cleared up by examining the provision's legislative history. This history makes evident that § 108(c)(1) refers to only "special suspensions" that are found in non-bankruptcy provisions such as the Internal Revenue Code. 124 Cong. Rec. H11,109 (daily ed. Sept. 28, 1978); accord 2 Lawrence P. King, Collier on Bankruptcy ¶ 108.04 (15th ed. 1993); See also H.R. Rep. No. 595, 95th Cong., 1st Sess. 318, reprinted in 1978 U.S.C.C.A.N. 5787, 6275.
>
> Our reading of the plain language and legislative history is buttressed by examining how other courts have treated this section of the code. [citing Grotting v. Hudson Shipbuilders, Inc., 85 B.R. 568, 569 (W.D. Wash. 1988) and In re Baird, 63 B.R. 60, 62 (Bankr. W.D.Ky. 1986)] [original emphasis]

Aslanidis' holding in respect of § 108(c) was followed by the Second Circuit in the decision below and most recently in Nova Bennett v. U.S. Lines, Inc., __ F.3d __, 1995 W.L. 497705 (2d Cir., August 22, 1995) (No. 94-9108, 1654), petition for reh'g filed. It has also been followed in Rogers v. Corrosion Products, Inc., 42 F.3d 292, 295 (5th Cir. 1995), cert. denied 115 S.Ct. 2614 (1995); In re Crysen/ Montenay Energy Co., 166 B.R. 546, 555 (S.D.N.Y. 1994) (quoting Aslanidis re "other federal or state statutes"); In re Confidential Investigative Consultants, Inc., 178 B.R. 739, 749 (Bankr. N.D. Ill. 1995) (same); Thurman v. Taforya, 895 P.2d 1050, 1055 (Sup. Ct. Colo. 1995) (en banc) (same). In express agreement with Aslanidis are Mamer v. Apex R.E. & T., 852 F.Supp. 870, 872 (E.D. Mo. 1994), aff'd, 59 F.3d 780, 783 (8th Cir. 1995) (Jones Act personal injury claimant time-barred because of failure to file his lawsuit within the 30 day extension of § 108(c)(2) and no circumstances existed to warrant equitable tolling); G.W. White & Son, Inc. v. Tripp, 1995 W.L. 65058, *3 (N.D.N.Y. 1995) ("a claimant would have until 30 days after the bankruptcy stay is lifted to file a claim", citing Aslanidis). See also, Easley v. Pettibone Michigan Corp., 990 F.2d 905, 912 (6th Cir. 1993) (products liability suit dismissed during pendency of Stay was untimely if not refiled within 30 days of Stay being lifted); Moser v. Universal Engineering Corp., 11 F.3d 720, 722 (7th Cir. 1993) (same); Pettibone Corp. v. Easley, 935 F.2d 120, 121 (7th Cir. 1991) ("Federal law assured plaintiffs 30 days in which to pick up the baton; if states want to give plaintiff additional time, that is their business. Some states do - e.g., Illinois, which tolls its statute of limitations during the entire bankruptcy proceeding [citation omitted]."); Farm Credit Bank of Texas v. Vallee, 148 B.R. 1021, 1024 (W.D. La. 1992) (argument that applicable prescriptive period suspended under § 108(c) rejected because of its "plain language" and "[n]othing has been presented indicating Congressional intention other than that expressed in the literal language of the statute."); In re

Deices, 137 B.R. 51, 55 (Bankr. S.D. Cal. 1992) ("no language in § 108(c) that suspends a statute of limitations from running", citing Grotting, supra); J.T. Industrial Contractors, Inc. v. Hargis Railcar, Inc., 458 S.E.2d 702, 703 (Ga. Ct. App. 1995) ("if the limitation period set by state law has expired during a bankruptcy, suit against the debtor must be commenced within 30 days after the termination of the automatic stay."); O'Lane v. Spinney, 874 P.2d 754, 756 (Sup. Ct. Nev. 1994) ("Subsection [108(c)](2) clearly anticipates that nonbankruptcy limitation periods may expire . . ."); Swartzman v. Harlan, 535 So.2d 605, 608 (Fla. App. 2 Dist. 1988) ("we adopt the better-reasoned position of Grotting [supra]"); Raikes v. Langford, 701 S.W.2d 142, 145 (Ky.Ct.App. 1986) ("§ 108(c) . . . operates to extend all state statutes of limitations applicable to the debtor.")

The only supposedly contrary Circuit decision on the application of § 108(c) to which Petitioner can point to support his alleged Circuit conflict is In re Hunters Run, Ltd Partnership, 875 F.2d 1425 (9th Cir. 1989). The Ninth Circuit decided that the eight month period to enforce mechanic's liens under Washington state law was "applicable non-bankruptcy law" that "fixes a period for commencing a civil action . . ." referred to in § 108(c). Id. at 1427. The Court held that § 108(c) "applies to toll the enforcement period of [the state statute]." 875 F.2d at 1428. It concluded:

> . . . our approach here corresponds with that recently announced by the Second Circuit addressing "the question whether section 108(c) tolls the expiration of periods governing the life of statutory liens." In re Morton, 866 F.2d 561, 566 (2d Cir. 1989). In that case, the Second Circuit held that section 108(c) operated to toll New York's ten-year period governing judgment

> liens on real property. Id. In so doing, the Second Circuit expressly rejected the approach of the bankruptcy court's opinion in this case. Id. As do we, the In re Morton court based its conclusion on statutory language. Id. In addition, the Second Circuit demonstrated persuasively that adherence to congressional purpose also required its result. See id. at 566-67 (tolling ensures that debtor cannot take "unfair advantage" simply by filing bankruptcy petition and allowing the limitations period to run). Cf. In re Phillips Construction Co., Inc., 579 F.2d 431, 432-33 (7th Cir. 1978) (similar position taken by Seventh Circuit but noting that facts of In re Warren [192 F. Supp. 801 (W.D. Wash. 1961)] "arguably distinguishable").

875 F.2d at 1429.

It is significant that Aslanidis specifically distinguished Morton, stating that "the holding in Morton is inapposite to the instant dispute, and Aslanidis may take no comfort from it." 7 F.3d at 1074. There is, therefore, no internal conflict in the Second Circuit as suggested by Petitioner. Equally, there is no conflict between the Second Circuit's decisions in Aslanidis, Bennett and the decision below, and the Ninth Circuit's decision in Hunters Run, which followed Morton.

Petitioner also cites McKinney v. Waterman S.S. Corp., 925 F.2d 1 (1st Cir. 1991). (Pet. at 9). However, § 108(c) is nowhere mentioned in that case and its statements about tolling are dicta. See Aslanidis, 7 F.3d at 1074. ("McKinney's statements about tolling are dicta . . ."). Apart from McKinney and In re Hunters Run, the only other Circuit Court decision cited by Skywark for the proposition that the Circuits are in

conflict is In re Richards, 994 F.2d 763, 765 (10th Cir. 1993). (Pet. at 10).

Richards concerned a tax assessment period under 11 U.S.C. § 507(a)(7)(A)(ii) which the Tenth Circuit held was suspended during the first of two successive bankruptcies under 11 U.S.C. § 105(a). 994 F.2d at 765. The Court made specific reference to those cases where another federal statute, 26 U.S.C. § 6503, suspended the tax collection period, but the suspension it applied was not by virtue of § 108(c). 994 F.2d at 766.

None of the above three decisions provides any basis for a good faith argument that there is a Circuit conflict.

Petitioner argues, however, that certiorari should be granted because there is also a conflict at the state level between "the Second and Fifth Circuits and the 'state court of last resort' in Illinois [citing Garbe Iron Works, Inc. v. Priester, 99 Ill. 2d 84, 457 N.E.2d 422 (1983)]." (Pet. at 11). Garbe is said to be the "leading case holding contrary to Aslanidis". (Pet. at 8).

Garbe Iron held that the filing of a bankruptcy petition, and the imposition of the Stay, stopped the applicable statute of limitations from running. This state court case, which predates the federal precedents, including Aslanidis, was expressly disapproved by Grotting, 85 B.R. at 570. ("[Garbe] . . . was decided by an Illinois state court which read into [§] 108(c)(1) an alleged Congressional intention to include bankruptcy suspensions such as the automatic stay. The better reasoned decision . . . is . . . In re Baird [supra] . . . .") Aslanidis endorsed both Grotting and Baird. 7 F.3d at 1093.

Moreover, Rogers, squarely rejected both Garbe Iron and Major Lumber Co. v. G&B Remodeling, Inc., 817 S.W.2d 474 (Mo. Ct. App. 1991), upon which Skywark also relies. (Pet. at 9). In Rogers, plaintiff alleged that he had suffered a pre-petition spinal injury at the debtor's facility. His wife also claimed damages for loss of consortium. The applicable one year statute of limitations expired during the pendency of the bankruptcy case and the Stay. The plaintiffs filed their complaint some three months after the debtor's case had been dismissed. The District Court, citing Aslanidis, dismissed plaintiffs' action as time-barred. The Fifth Circuit affirmed, agreeing that the Rogers had "'slept on [their] rights'." 42 F.3d at 295.

On appeal, however, the Rogers argued for tolling based on the same state court decisions, Garbe Iron and Major Lumber and Wells v. California Tomato Juice Inc., 118 P.2d 916 (Cal. Ct.App. 1941), relied upon by Aslanidis and now repeated by Skywark. 42 F.3d at 297 n. 7. The Fifth Circuit rejected the tolling argument, stating:

> We base our decision on the plain words of the statute and find that § 108(c) does not create a separate tolling provision [citation omitted]. The statute plainly states that for the time period to be suspended, other federal or state law must mandate it and then be incorporated through § 108(c). Otherwise, a party must file suit within the thirty-day grace period after the end of the stay. We need not and do not reach the legislative history and policy arguments.

42 F.3d at 297.

Skywark also cites six Bankruptcy Court decisions to support his conclusion that there is a conflict.[2] (Pet. at 10). This is not the case. As noted by Rogers, in distinguishing Victoria Grain, Houts and Design Builders, "they stand for the more general proposition that § 108(c) applies to the time limits of lien enforcement (statutes of duration) as well as the more generally applicable time limits of statutes of limitation." 42 F.3d at 296, n.4. Rogers also stated, in distinguishing Coan and Chemisphere, that "other courts have reached the same result as did the Second Circuit [in Aslanidis]." 42 F.3d at 297. Although Coan is cited by Petitioner for the proposition that "the applicable statute of limitations is tolled during the pendency of a bankruptcy stay", it held exactly the opposite. (Pet. at 10). Coan held that "[i]n these circumstances, § 108(c) extends the period for enforcing the Movants' lien until 30 days after the termination of the automatic stay." 96 B.R. at 833 (emphasis added).

The sixth case cited by Petitioner, New England Carpet, deals with the Stay's effect on the creation as opposed to perfection of liens, and its relation to the creation of a secured or unsecured claim under Vermont law. 26 B.R. at 939. The case does not so much as mention 11 U.S.C. § 108. The Second Circuit's decisions are, in any event, more authoritative precedent.

---

[2] In re Chemisphere Partners, 90 B.R. 380, 382 (Bankr. N.D. Ill. 1988); In re Coan, 96 B.R. 828, 832 (Bankr. N.D. Ill. 1989); In re Design Builders, 18 B.R. 392, 394-95 (Bankr. D. Idaho 1981); In re Houts, 23 B.R. 705, 707 (Bankr. W.D. Mo. 1982); In re New England Carpet Co., 26 B.R. 934, 939 (Bankr. Vt. 1983); In re Victoria Grain Co., 45 B.R. 2, 6 (Bankr. Minn. 1984).

C. THE SECOND CIRCUIT DID NOT ENGAGE IN ANY EXAMINATION OF LEGISLATIVE HISTORY IN BREACH OF RULES OF STATUTORY CONSTRUCTION

Petitioner asserts that the decision below is in conflict with this Court's decisions regarding rules of statutory construction because it improperly reviews legislative history, citing Connecticut Nat. Bank v. Germain, supra. (Pet. at 13). The decision below does not mention any legislative history whatsoever. It does, however, cite Aslanidis. It was Aslanidis, not the decision below, that reviewed legislative history to conclude:

> Our reading of the plain language and legislative history is buttressed by examining how other courts have treated this section of the [C]ode. [citations omitted; emphasis added]

7 F.3d at 1073.

Aslanidis' reading of § 108(c) was not therefore based solely on an allegedly "prohibited" reading of legislative history, but also on the "plain language" of the statute and other authority. Moreover, Rogers noted:

> While the Second Circuit's reading of § 108(c) in Aslanidis could have been based solely upon the plain language of the statute, the court nevertheless also examined the legislative history and found that it supported its interpretation. [emphasis added]

42 F.3d at 296, n. 4.

For its part, however, the Fifth Circuit noted in Rogers:

> The statute plainly states that for the time period to be suspended, other federal or state law must mandate it and then be incorporated through § 108(c) . . . We need not and do not reach the legislative history and policy arguments.

42 F.3d at 297.

The decision below cannot be attacked because of its citation of Aslanidis which, in turn, is attacked because it allegedly improperly reviewed § 108(c)'s legislative history. (Pet. at 12-15). The plain language of the statute was also relied upon both by Aslanidis and by the decision below in affirming the District Court's reading of the "plain language of 11 U.S.C. § 108(c)". (8a). Indeed, the infirmity of Petitioner's argument is demonstrated by the fact that the Second Circuit has cited Aslanidis on three subsequent occasions for its proposition "a court should presume that a statute says what it means." 7 F.3d at 1072. See, Wetzler v. F.D.I.C., 38 F.3d 69, 73 (2d Cir. 1994); Rahim v. McNary, 24 F.3d 440, 443 (2d Cir. 1994); Motor Vehicle Mfrs. v. N.Y.S. Dept. of Env. Cons., 17 F.3d 521, 531 (2d Cir. 1994); see also Banque Arabe v. Maryland Nat. Bank, 850 F. Supp. 1199, 1209 (S.D.N.Y. 1994), aff'd 57 F.3d 146 (2d Cir. 1995).

D. THE "APPLICABLE NONBANKRUPTCY LAW" FIXING THE THREE YEAR PERIOD FOR MARITIME TORT CLAIMS DOES NOT INCLUDE SUSPENSION BY EQUITABLE TOLLING

Petitioner admits that the "applicable nonbankruptcy law . . . fix[ing] a period for commencing or continuing a civil action" in respect of the Claim is 45 U.S.C. § 56 and 46 U.S.C. § 763a. (Pet. at 7). As Petitioner states, "each of the applicable limitations periods is three years from the date the claim accrued." (Pet. at 5). Neither of those applicable statutes of limitations provides for any "suspension". The language "the end of such period, including any suspension of such period" in § 108(c)(1) must be read in the context of the preceding language in subsection (c) that refers to "applicable non-bankruptcy law . . . [that] fixes a period". Section 6503(h)(2) of the Internal Revenue Code, 26 U.S.C. § 6503(h)(2), is precisely such a "nonbankruptcy" statute specifically providing for a suspension. See In re West, 5 F.3d 423, 427 n.9 (9th Cir. 1993) (collecting cases).

Petitioner's argument that "applicable nonbankruptcy law . . . [that] fixes a period" means not only the two applicable maritime statutes of limitation but also common law principles of equitable tolling would render § 108(c) wholly nugatory. If, as Petitioner erroneously asserts, the Stay gives rise to equitable tolling of statutes of limitation which, in turn, is the "applicable nonbankruptcy law" referred to by § 108(c), then statutes of limitation would never expire during the Stay and would never have to be extended by 30 days, as provided in § 108(c)(2).

As Aslanidis stated:

> The reference in § 108(c)(1) to "suspension" of time limits clearly does not operate in itself to stop the running of a statute of limitations; rather this language merely incorporates suspensions of deadlines that are expressly provided in other federal or state statutes. [original emphasis]

7 F.3d at 1073.

Aslanidis specifically rejected the identical tolling arguments made by Petitioner. 7 F.3d at 1074. Likewise in Mamer v. Apex R.E. & T., 852 F.Supp. at 872, the District Court held in the context of a Jones Act personal injury claim that "[t]here is no common law or statutory authority . . . for the tolling of the statute of limitations during the period in which plaintiff's claims are subject to the bankruptcy stay." The Eighth Circuit affirmed. Mamer, supra. The decision below likewise concluded "maritime law therefore does not provide for tolling while the automatic stay is in effect." (3a). None of the cases cited by Petitioner support his argument that maritime tort statutes of limitation are equitably tolled merely by the imposition of the Stay.

Petitioner's argument is, in essence, a factual one: that grounds existed for equitable tolling in addition to the Stay. He states that the "only appellate court to have spoken on this issue in the context of a Jones Act proceeding was McKinney . . .". (Pet. at 21). Whether or not Petitioner's counsel mistakenly relied on McKinney, which does not mention § 108(c), this provides no grounds for tolling. Aslanidis made clear in declining to follow McKinney, that the First Circuit's "statements about tolling are dicta." 7 F.3d at 1074. Moreover, the language and, if any guide were needed, the legislative history of § 108(c) were plain to read. As noted by Collier "the

1898 Act dealt in terms of suspension of a period of limitations, rather than an extension of a period as it is worded under the Code." Id., ¶ 108.01 at p. 108-3. Grotting, a Jones Act case dealing expressly with § 108(c), was also available to enlighten Skywark's former counsel, if need be.

Petitioner, as a second alleged ground for equitable tolling, attempts to discredit the Second Circuit's conclusion that "tolling rationale does not apply in the bankruptcy area because plaintiffs have advance knowledge of when claims are to expire and may act to protect themselves [citations omitted]." 7 F.3d at 1074. Petitioner asserts that the Second Circuit was wrong to assume that if he had requested relief from the Stay then that relief would have been granted. (Pet. at 21). That argument ignores the fact that the P.I. Order specifically provided for such relief and that the Trust had asked Petitioner when he would obtain it. (78). Moreover, under Southern District of New York Local Bankruptcy Rule 79, Petitioner could have filed an action in rem against the M/V AMERICAN GEORGIA, on which he served at the time of his alleged injury, at any time irrespective of the Stay and Restraining Order.

Not only are common law principles of equitable tolling not the "applicable nonbankruptcy law" for the "suspension" referred to in § 108(c)(1), but the District Court's factual finding, affirmed by the Second Circuit, that no grounds existed for equitable tolling was correct. Petitioner should, however, be aware that findings of fact do not belong before this Court. United States v. Johnston, 268 U.S. 220, 227 (1925).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JEREMY J. O. HARWOOD
Counsel of Record
HEALY & BAILLIE
Attorneys for Respondent
29 Broadway
New York, New York 10006
(212) 943-3980

Of Counsel:
PHILIP S. LA PENTA
Dated: September 20, 1995